Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

DAVID DOLAN

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner was denied his Sixth Amendment right to a unanimous verdict in a trial of a mail fraud indictment which charged multiple factual theories of a scheme to defraud insurance companies, where the trial court failed to instruct the jury that it must reach a unanimous verdict on each element of the offense.

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CITATIONS OF THE DECISIONS BELOW

The decision of the district court is not reported.

The panel opinion of the Sixth Circuit Court of Appeals is not reported.

The order of the Sixth Circuit Court of Appeals denying Petitioner's Motion for Rehearing and Rehearing En Banc is not reported.

BASIS OF JURISDICTION IN THIS COURT

The Sixth Circuit Court of Appeals filed its Opinion affirming Petitioner's conviction and sentence on October 17, 1996. On December 17, 1996, the Sixth Circuit Court of Appeals entered an Order Denying Petitioner's Petition for Rehearing and Rehearing En Banc.

This court has jurisdiction to review the decision of the Sixth Circuit on Writ of Certiorari pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

18 USC § 1341 provides:

"**Frauds and swindles**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the

purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,00 or imprisoned not more than 30 years, or both."

Rule 31(a) Federal Rules of Criminal Procedures provides:

"Rule 31. Verdict

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court."

STATEMENT OF THE CASE

The instant indictment charged, and Petitioner was convicted of, violations of 18 USC § 1341. These are "offenses against the laws of the United States" within the meaning of 18 USC § 3231. Accordingly, the United States District Court for the Eastern District of Michigan, the court of first instance, had subject matter jurisdiction over the underlying criminal case.

On February 18, 1993, FBI agents removed approximately 5,000 patient records from the offices of Petitioner pursuant to a search warrant. Petitioner is an endodontist. Endodondists treat the internal portion of teeth and supporting tissue. Root canal procedures make up approximately 95% of the endodontic practice. The remaining 5% is made up of endodontic surgeries. Blue Cross/Blue Shield of Michigan (BCBSM) assisted the FBI in its investigation and selected 15 of the 5,000 records which were then used by the Government in its indictment.

On October 10, 1994, Petitioner was indicted on 38 counts of mail fraud. Each count alleged that a check was sent through the mails in payment of claims for services performed by Petitioner pursuant to a scheme which the indictment described as one to fraudulently bill insurance companies, including BCBSM, as follows:

> "DOLAN was a dentist specializing in endodontics whose office was located in Livonia, Michigan. DOLAN fraudulently billed BCBSM and other insurance companies, and his patients, in order to obtain money he was not entitled to. That is, DOLAN:
>
> - in instances where patients had more than one insurance carrier potentially responsible

for payment for services rendered to the patients, billed each insurance company as if it was the primary carrier and either represented that there was no other insurance or fraudulently failed to disclose the existence of other insurance;

- billed each insurance company for the same services;

- billed the insurance companies for alleged "medical" services which were in fact "dental" services;

- billed the insurance companies for alleged "medical" services which had already been billed as "dental" services;

- billed the insurance companies for services which had already been reimbursed as an included component of another billed procedure;

- billed the insurance companies for alleged "hard tissue biopsies" which were in fact "soft tissue biopsies";

- billed the insurance companies for services not in fact rendered;

- failed to return to the insurance companies the excess compensation which he received as a result of his fraudulent billings;

- in some instances, collected fees from his patients which he should not have collected as a "participating" provider pursuant to his agreements with the insurance companies;

- in other instances, failed to collect from his patients co-payments which were required under his and his patients' agreements with the insurance companies;

- falsely stated the date of service on billings to insurance companies in instances where the patient would otherwise have been determined to have exhausted his yearly insurance benefits and not be currently eligible for further benefits."

In opening and closing arguments to the jury, the prosecutor explained that the fraud was carried out through Petitioner's conduct which violated three basic concepts or procedures for the submission of claims to BCBSM and other insurance carriers. He told the jury that Petitioner submitted claims for medical services which should have been submitted as claims for dental services; that Petitioner violated a rule of "global billing" by seeking payment for component parts of services rather than a single payment for one service; and, that Petitioner failed to coordinate benefits for patients between insurance companies when patients had more than one coverage.

Petitioner submitted a written request to the trial court for a jury instruction entitled "Unanimity - Explained" adapted from a pattern instruction suggested for use in connection with mail fraud charges. (Devitt, Blackmar and O'Malley § 40.17, Federal Jury Practice and Instructions, 4th Ed 1990) The trial court failed to give the jury instruction

and objection was not placed on the record. The jury returned guilty verdicts on all counts.

On July 5, 1995, Petitioner was sentenced by Judge Gilmore to 24 months custody, 2 years supervised release, a fine in the amount of $86,715.41, restitution of $6,263.60 and special assessments of $1,900.00.

Among other issues raised on appeal, Petitioner challenged the trial court's refusal to give the specific unanimity instruction required by United States v Duncan, 850 F2d 1104 (6th Cir 1988). Duncan holds that a specific unanimity instruction must be given to the jury: where there are alternative factual theories as to an essential element of the offense charged, each of which is supported by discrete facts which constitute the essential culpable acts proscribed by the statue; where there is a likelihood of jury confusion; and where the case is unusually complex. Id. at 1111, 1114.

On October 17, 1996, the Sixth Circuit Court of Appeals filed an Opinion affirming Petitioner's conviction stating that it places little value on United States v Duncan, supra because its holding had been discredited by this court in Schad v Arizona, 501 US 624, 111 S Ct 2491 (1991). Even though the unanimity issue concerned the scheme element of the mail fraud offense, the Panel Opinion concluded that "because each juror could reasonably conclude that the individual mailings listed in each count constituted a distinct "means" of furthering defendant's fraudulent scheme, there is no threat that a patchwork verdict resulted." (Panel Opinion, p. 9)

On November 11, 1996, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc with the Sixth Circuit Court of Appeals arguing that the panel opinion was in error in concluding that Schad v Arizona, supra, discredited the rationale of United States v Duncan, supra, and the requirement of unanimity on each essential element of the offense where the indictment and theory of prosecution is

based upon multiple factual theories of proof as to an essential element of the offense charged. The Petition for Rehearing and Rehearing En Banc was denied by an order of the Sixth Circuit Court of Appeals on December 17, 1996.

REASONS FOR GRANTING THE WRIT

The mail fraud statute, 18 USC § 1341, prohibits the use of the mails in furtherance of a scheme to defraud. A scheme to defraud is an essential element of a mail fraud offense. McNally v United States, 483 US 350, 97 L Ed 2d 292, 107 S Ct 2875 (1987). The scheme element of mail fraud is not a mere means for commission of an offense; rather, the scheme element is the essence of mail fraud. "Insofar as the sparse legislative history reveals anything, it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." 483 US at 356.

An indictment may allege more than one theory as part of a single fraudulent scheme, Rule 7(c)(1), F.R. Crim P.; United States v Miller, 471 US 130, 85 L Ed 2d 99, 104, 105 S Ct 1811 (1985); and, a defendant may be tried on less than all the fraud theories alleged as part of the scheme. Id. at 111; Salinger v United States, 272 US 542, 71 L Ed 398, 47 S Ct 173 (1926). However, multiple theories of proof, each established by discrete facts, may significantly undermine confidence that all members of the jury will reach a unanimous agreement on the essential culpable acts of the offense unless the jury is specifically instructed that it must reach unanimous agreement as to each element. Due process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." In Re: Winship, 397 US 358,364; 90 S Ct 1068, 1073; 25 LE2d 368 (1970).

A trial court's failure to instruct a jury that it must be unanimous as to which of multiple factual theories of fraud it may use as a basis for its verdict and finding of guilt deprives the defendant of a substantial right to jury unanimity protected by Rule 31(a) FR Crim P and the Sixth Amendment. United States v Mastelotto, 717 F2d 1238, 1247-1251 (9th Cir 1983). Unanimity must mean more than a conclusory agreement that a defendant violated the mail fraud statute. United States v Ferris, 719 F2d 1405, 1407 (9th Cir 1983). This Court has not addressed the scope or meaning of jury specificity required in a federal criminal case beyond the basic requirement of unanimity as to guilt or lack of guilt. Schad v. Arizona, 111 S Ct at 2498. However, several Circuit Courts of Appeal have required that courts specifically instruct jurors that their verdicts must be unanimous as to the ultimate decision and as to the elements of the offense if the prosecution presents discrete sets of alternative factual theories.

The Court of Appeals for the Sixth Circuit adopted this rationale in United States v Duncan, 850 F2d 1104 (6th Cir 1988), and concluded that a specific unanimity instruction was required. Duncan had been charged with submitting false tax returns to the Internal Revenue Service in violation of 26 USC § 7206(1). The indictment alleged that one of Duncan's returns was false because it misrepresented a short term capital gain as ordinary income and because it misrepresented an expense deduction. The court concluded that it was necessary for the jury to reach a unanimous verdict on one or the other allegation of falsity contained within a specific count and that it was necessary for the court to give a specific instruction to the jury that it must be unanimous as to which set of facts it might rely upon to reach a verdict. This is so, the court held, because the indictment permitted proof of conceptually distinct groupings of facts as to an essential element of the offense charged. Id. at 1113. The Court

further held it was necessary for the trial court to give a specific unanimity instruction after jury deliberations began because the case was complex and because there was evidence of jury confusion. Id. at 1114.

Other Circuit Courts have reached similar conclusions and have required specific jury unanimity when prosecutions proceed on multiple factual theories. The Court of Appeals for the Sixth Circuit in Duncan, supra, relied upon decisions in United States v Peterson, 768 F2d 64, 67 (2nd Cir 1985) cert den, 474 US 923, 106 S Ct 257, 88 L Ed 2d 264 (two discrete instances of drug possession charged in the same count); United States v Beros, 833 F2d 455 (3rd Cir 1987)(three financial transactions charged in the same count as instances of embezzlement); and United States v Ferris, 719 F2d 1405 (9th Cir 1983), (separate acts as part of a single drug transaction; not so discrete to require unanimity instruction).

Petitioner Dolan was tried on an indictment which charged a violation of the mail fraud statute and more specifically alleged a fraudulent scheme made up of 11 theories. At trial, the prosecutor refined these allegations and focused upon the theory that the Petitioner devised a scheme to defraud insurance carriers (1) by submission of claims to medical insurance for services which were dental and could not be covered by medical insurance; (2) by failing to coordinate insurance benefits between primary and secondary insurers; and (3) by unbundling or segmenting claims so that Petitioner billed for individual component parts rather than one inclusive procedure in violation of a so-called "global billing" rule.

The Court of Appeals for the Sixth Circuit rejected Petitioner's appeal concluding that it could place "little value on Duncan's holding with respect to the requirement of a specific unanimity instruction". (Panel Opinion, page 4, quoting United States v Newman, 16 F3d 1222, 1993 WL

503078, at **10 (6th Cir, 12/07/93)(per curiam)(unpublished). In reaching this conclusion, the Court noted that, "Duncan was premised upon a Fifth Circuit opinion, United States v Gipson, 553 F2d 453 (5th Cir 1977) which was later discredited by this Court in Schad v Arizona, 501 US 624, 637-38, 111 S Ct 2491, 2500 (1991)". Id. at 8-9. The Court of Appeals for the Sixth Circuit reached a similar conclusion earlier in United States v Sanderson, 966 F2d 184, 187 (6th Cir 1992), where it incorrectly applied this Court's holding in Schad to conclude that omission of a specific unanimity instruction was not error in a case in which an indictment alleged alternative factual theories in support of a single count.

Contrary to the Court of Appeals for the Sixth Circuit's analysis in Petitioner's case and in Sanderson, supra, this Court's holding in Schad v Arizona, supra, does not diminish the necessity for a specific unanimity instruction where an indictment alleges more than one fact theory to support proof of an essential element of the offense charged. Schad, supra, does not diminish a federal defendant's right to a unanimous verdict.

In Schad v Arizona, supra, this Court concluded that Arizona's characterization of first-degree murder as a single crime, though supported by alternative bases for mens rea of pre-meditation and felony murder, was not unconstitutional, id. at 2493, 2496-2504. In Schad, supra, this Court did not decide what standard of verdict specifically is required when a federal indictment alleges alternative, factually distinct theories by which an essential element of the offense was carried out. Rather than set limits of factual specificity which trigger the necessity for jury specificity on elements of an offense, this Court saw the issue in Schad as "one of the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions, not one of jury unanimity". 111 S Ct at 2496.

In Petitioner's case, it was not alternative statutory formulations of the scheme to defraud element which created the prosecutor's alternative theories of proof. Schad v. Arizona, supra; United States v Gipson, supra. Rather, in Petitioner's case the prosecution relied upon alternative and factually separable theories, each of which was a possible basis of the jury's conclusions of guilt. It is because of those alternatives that jury specificity was required.

Unlike the Court of Appeals for the Sixth Circuit, the Circuit Courts of Appeal for the Third and Fifth Circuits have concluded that Schad v Arizona, supra, does not limit the necessity of factual unanimity by a jury in a federal criminal trial.

In United States v Holley, 942 F2d 916 (5th Cir 1991), the Court of Appeals for the Fifth Circuit concluded that a special unanimity instruction was required. The defendant was charged with perjury. Each count alleged more than one false material statement by the defendant as his alleged perjury. The court found these facts did not fit the analysis in Schad, supra. The Court observed that Holley's case was closer to the issue of duplicity which arises when two or more factually discrete offenses are alleged in the same count. Id. at 927-928. The Court concluded that where there is a "reasonable possibility that the jury was not unanimous with respect to at least one statement in each count," id. at 929, a specific unanimity instruction should have been given to the jury.

In United States v Edmonds, 80 F3d 810 (3rd Cir 1996)(en banc), where the defendant was charged with violating the Continuing Criminal Enterprise statute, 21 USC § 846, which statute requires an allegation the defendant committed a specified drug offense as part of a "continuing series" of violations, the Court concluded that "substantial agreement on a discrete set of actions is essential to ensure that the defendant is guilty beyond a reasonable doubt of some

specific illegal conduct." Id. at 819.

Petitioner's claim is not diminished by the conclusion of the Panel Opinion of the Court of Appeals for the Sixth Circuit which states that Petitioner did not object to the trial court's failure to give a specific unanimity instruction (Panel Opinion, page 5) and that the Court would, therefore, review the issue for "plain error." Petitioner submitted a request for a specific unanimity instruction to the trial court before jury selection. He did so because of the multiple fraud theories advanced by the prosecution. Petitioner's position with regard to these theories was placed on the record throughout the trial proceedings, from his pretrial Motion for Bill of Particulars to his Motions for Judgment of Acquittal at the close of the prosecution's proofs. United States v Beros, 833 F2d 455, 458, fn 3 (3rd Cir 1987). The omission from the trial record of a specific objection, following the trial court's instructions to the jury in these circumstances, should not diminish Petitioner's claim that because there was no specific unanimity instruction, he was denied his right to a unanimous verdict. Without unanimous agreement on essential facts a jury cannot render a proper verdict. In RE: Winship, supra; Sullivan v Louisiana, 113 S Ct 2078 (1993).

CONCLUSION

Petitioner presents an important issue for consideration by the court, which issue is whether specific jury unanimity is required when the prosecution relies on discrete alternative factual bases for proof of an essential element of the offense charged. The decision of the Sixth Circuit Court of Appeals is based on a fundamentally flawed understanding of the right to a unanimous verdict in such cases. The Panel Decision of the Court of Appeals is in conflict with decisions of the Second, Third, Fifth and Ninth Circuit Courts of Appeal.

This Court should grant Certiorari and, upon plenary hearing, reverse the decision of the court below affirming Petitioner's conviction and sentence for mail fraud.

Respectfully submitted,

/S/_____

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DATED: March 7, 1997

APPENDIX A

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NOT RECOMMENDED FOR PUBLICATION
NO. 95-1769

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

DAVID W. DOLAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

No. 95-1769
USA v. Dolan

BEFORE: BOGGS and MILBURN, Circuit Judges; and QUIST, District Judge.*

QUIST, District Judge, Defendant-Appellant, David Dolan, appeals from a jury verdict finding him guilty of thirty-eight (38) counts of mail fraud, 18 U.S.C. § 1341. Defendant raises several issues for review. For the reasons stated below, we affirm.

I.

Defendant has been a dentist specializing in endodontics since 1982. He is one of approximately 30 endodontists practicing in Michigan. Endodontists treat the internal portions of teeth and supporting tissue. The bulk of defendant's work consisted of performing root canals, treating problems in teeth containing preexisting root canals, and procedures involving the infection of the teeth and surrounding tissue. In general, root canals comprise 95% of an endodontist's practice; the remaining 5% is comprised of endodontic surgeries.

On August 10, 1994, defendant was indicted in the Eastern District of Michigan. The indictment charged defendant with thirty-eight (38) counts of mail fraud pursuant to 18 U.S.C. § 1341. The indictment alleged that defendant defrauded insurance companies through the submission of false billings using eleven different methods. Some of these alleged methods include:

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* The Honorable Gordon J. Quist, United States S\District Judge for the Western District of Michigan, sitting by designation.

-billed each insurance company for the same services;
-billed the insurance companies for alleged "medical" services which were in fact "e\dental" services;
-billed the insurance companies for alleged "medical" services when they had already been billed as "dental" services; [and]
-billed the insurance companies for services not in fact rendered.

Each count of the indictment alleged a separate mailing of an insurance company check to defendant as payment for claimed services.

On February 18, 1993, FBI agents arrived at defendant's office to execute a search warrant for patient records and billing information. Pursuant to the search, the agents removed approximately 5,000 patient charts. The Government requested Blue Cross/Blue Shield of Michigan ("BCBSM") to review the charts. BCBSM focused on defendant's medical billings to BCBSM between 1988 and 1992. This sample amounted to 161 charts. This sample was narrowed to the 39 which contained evidence of both medical and dental claims. Fifteen of the 39 were relied upon by the Government in the 38 counts of the indictment.

Trial began in United States District Court on February 21, 1995. During the course of the trial the court received into evidence the testimony of Dr. Shirley Austin, a dentist and BCBSM dental program administrator, as an expert witness. The trial court also received tax returns for the defendant's professional corporation for the years at issue. Trial concluded on March 14, 1995. The following day, the jury returned a verdict of guilty on all counts.

On July 5, 1995, after adopting the $378,334.33 figure set forth in the amended presentence report as the

amount of fraud loss under U.S.S.G. § 2F1.1(b), the trial court sentenced defendant to 24 months of imprisonment and two years of supervised release. The trial court also imposed a $86,715.41 fine and a special assessment of $1,900, and required that restitution be made to the insurers in the amount of $6,263.60. Defendant filed a timely notice of appeal.

II.

Defendant sets forth several arguments challenging his conviction. Defendant argues that the trial court erred: (1) by denying his pretrial motion for a bill of particulars; (2) by failing to give his requested "Unanimity of Theory" jury instructions; (3) by denying his motions for judgment of acquittal; (4) by receiving into evidence the testimony of Dr. Shirley Austin; (5) by receiving into evidence tax returns from defendant's professional corporation; and (6) by relying upon a dollar figure supplied by BCBSM to determine relevant conduct prior to sentencing defendant.

Bill of Particulars

A trial court's refusal to grant a defendant's motion for a bill of particulars is reviewed for abuse of discretion. *United States v. Salisbury*, 983 F.2d 1369, 1375 (6th Cir. 1993). In order to succeed on his appeal, defendant must make a "'showing of actual surprise at trial and prejudice to the defendant's substantial rights by the denial'" of his motion. *United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991) (quoting *United States v. Paiva*, 892 F.2d 148, 154 (1st Cir. 1989)).

Defendant argues that the denial of the bill of

particulars prevented defendant from preparing an adequate defense at trial. Defendant contends that the indictment made several allegations not argued at trial, and that the prosecution referenced four different medical billing insurance codes at trial. Defendant argues that without more specific notice through a bill of particulars, the relevance of the procedural codes and theories as to each of the counts and the alleged scheme remained "shrouded in mystery." Defendant compares his circumstances with that of the defendants in *United States v. Bortnovsky*, 820 F.2d 572 (2d Cir. 1987), wherein the Second Circuit held that the trial court abused its discretion in denying a bill of particulars.

In *Bortnovsky*, the Second Circuit held that defendants' ability to prepare an adequate defense was seriously compromised by the Government's failure to "reveal crucial information: the dates of the fake burglaries and the identity of the three fraudulent documents." *Id.* at 574. The *Bortnovsky* court stated that the "Government did not fulfill its obligation merely by providing mountains of documents to defense counsel who were left unguided as to which documents would be proven falsified or which of some fifteen burglaries would be demonstrated to be staged." *Id.* at 575. The defense was held to have been especially compromised when the Government turned over its "mountain" of documents at such a late date that defense counsel had only four days to prepare a defense. *Id.*

In the instant case, however, such tactics are not at issue. At some point prior to September 28, 1994, defendant was provided with a binder containing every document that the prosecution relied upon in drafting the indictment. (Tr., 9/28/94, at 6-7). Furthermore, under each count, the indictment itself lists: the date of the insurance check; the

amount of the check; whether the type of insurance billed was for medical or dental expenses; and the name of the patient. It is undisputed that defendant had adequate access to all materials, including files, seized from his office. In denying defendant's motion, the trial court took note of defendant's access to the patent records and held that the indictment was sufficiently specific to permit defendant to prepare his defense, to prevent unfair surprise at trial, and to raise a double jeopardy bar to subsequent prosecution. Thus, denial of defendant's motion was not an abuse of discretion.

Unanimity of Theory

No party "may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict." Fed. R. Crim. P. 30. Defendant did not object to the trial court's alleged failure to give the jury an augmented unanimity instruction before the jury retired. Because no objection was made at trial, defendant's claim is reviewable under the "plain error" standard.[1] *United States v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992) (reviewing specific unanimity instructions). The court must "consider whether the instructions, taken as

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[1] Defendant cites *United States v. Beros*, 833 F.2d 455, 458 n.3 (3d Cir. 1987) for the proposition that a trial court's decision not to instruct a jury on unanimity of theory is reviewed for abuse of discretion. *Beros*, however, also noted that the more deferential "plain error" standard is applicable when no objection to the instruction is made or where no alternative jury instructions are proposed. *Id.*

a whole, were so clearly wrong as to produce a grave miscarriage of justice." *Id.* "Ordinarily it is not necessary to give specific unanimity instructions unless 1) a count is extremely complex, 2) there is variance between the indictment and the proof at trial, or 3) there is a tangible risk of jury confusion." *Sanderson*, 966 F.2d at 187 (citing *United States v. Duncan*, 850 F.2d 1104, 1114 (6th Cir. 1988), *cert. denied sub nom. Downing v. United States*, 493 U.S. 1025, 110 S. Ct. 732 (1990)).

Defendant argues that the trial court judge was required to give an augmented "unanimity of theory" instruction to the jury in order to avoid a "patchwork verdict."[2] Defendant theorizes that there was a tangible risk of jury confusion because each juror could have believed that the individual mailing listed in each count constituted a different "scheme" to defraud because eleven different theories of mail fraud appear in the indictment and at least three different theories were argued at trial. Defendant contends that whenever an indictment involving mail fraud allows different jurors to reach separate conclusions about the existence of a single scheme, a special instruction should be given. *See United States v. Merklinger*, 16 F.3d 670, 678 (6th Cir. 1994) (listing the three elements in a mail fraud

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[2]As an example, a patchwork verdict results when only six jurors agree that one specific illegal act was committed, while the other six agree that a different illegal act was committed, but the jury as a whole returns a guilty verdict. While there is no unanimity between the jurors as to all principal factual elements underlying the specified offense, the jurors are able to produce an inappropriate guilty verdict because they are all of the opinion that some illegal act was committed.

case, two of which mention a scheme).

In response, the Government argues that mail fraud is a generic offense which may be committed in a variety of different ways and that each count in the indictment set forth clearly how defendant committed the offense. The Government maintains that the instant case does not present a situation where the offense could be committed by separate means under each count. The Government concludes that because none of the counts were set forth in complex language, there was no variance between the indictment and the proof at trial, and there is no tangible risk of jury confusion, there was no reason for the trial court to give an augmented unanimity instruction.

We agree with the Government's position. Absent proof that the grand jury was improperly charged, the court must presume that the prosecutor and grand jury charged "but one crime in each count of the indictment." *United States v. Mastelotto*, 717 F.2d 1238, 1244 (9th Cir. 1983) (mail fraud) (citing Fed. R. Crim. P. 8(a)). In short, if the indictment may be read to charge but one crime in each count, the court will do so. *Mastelotto*, 717 F.2d at 1244. When determining whether each count of an indictment charges defendant with a unity scheme to defraud or with multiple schemes to defraud, the Fifth and Ninth Circuits have recognized that

> the defrauding of different people over an extended period of time, using different means and representations, may constitute but one scheme. Naturally, by clear analogy it does not make any difference that the various deceptions were practiced at different places. Nor is it significant that the whole scheme was

> not planned out in advance. A continuing "intention to devise it," . . . or an imperfectly conceived plan to defraud which becomes more and more sophisticated and grandiose as the plan progresses and the assets of the more gullible victims are exhausted, may well constitute a single scheme.

Id. at 1245 (quoting *Owens v. United States*, 221 F.2d 351, 354 (5th Cir. 1955)).

We believe that each count in the indictment may be read to have charged defendant Dolan with a unitary scheme to defraud. Each count refers to a different mailing, or means of defrauding different people, in furtherance of defendant's scheme to overcharge his patients and their insurance carriers. (Indictment at ¶II.) While defendant utilized a number of different fraudulent billings practices as part of his scheme, defendant's desire to overcharge various insurance carriers for his work by use of the mails was the sole motivation for his wrongdoings. Furthermore, even if this Court accepts defendant's assertion that the Government argued three rather than eleven theories of fraud at trial, there is no proof that the Government brought evidence of additional schemes before the jury.

Defendant's reliance upon *United States v. Mastelotto*, 717 F.2d 1238 and *United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988) is misplaced. In *Mastelotto*, the court held that the trial judge effectively instructed the jury that "even if any particular juror did find the existence of several 'schemes,' the juror could nonetheless vote for conviction if the mailing or phone call was in furtherance of at least 'a scheme in which the defendant was a participant.'"

Mastelotto, 717 F.2d at 1249-50. Thus, the instructions at issue in *Mastelotto* "required neither unanimity nor a finding of the existence of the charged scheme." *Id.* In contrast, at the conclusion of the defendant Dolan's trial, the trial court judge gave clear instructions on the elements of mail fraud, the nature of the offense, the nature of the term "scheme," and the unanimity requirement. There is no evidence of juror confusion. Furthermore, the Sixth Circuit has noted that *Duncan* was premised upon a Fifth Circuit opinion, *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), which was later discredited by the Supreme Court in *Schad v. Arizona*, 501 U.S. 624, 637-38, 111 S. Ct. 2491, 2500 (1991). *United States v. Newman*, 16 F.3d 1222, 1993 WL 503078, at **10 (6th Cir. Dec. 7, 1993) (per curiam). As a result, we place "little value on *Duncan*'s holding with respect to the requirement of a specific jury unanimity instruction." *Id.*

While a jury must agree on all of the elements of an offense, it need not agree on the means by which all the elements were accomplished. *United States v. Freshour*, 64 F.3d 664, 1995 WL 496662, at **7 (6th Cir. Aug. 17, 1995) (citing *Schad*, 501 U.S. at 637-38, 111 S. Ct. At 2500), *cert. denied sub nom. Tino v. United States*, ____ U.S. ____, 116 S. Ct. 910 (1996) and ___ U.S. ___, 116 S. Ct. 1045 (1996). In the instant case, because each juror could reasonably conclude that the individual mailings listed in each count constituted a distinct "means" of furthering defendant's fraudulent scheme, there is not threat that a patchwork verdict resulted. Thus, there was no plain error in denying defendant's request for augmented jury instructions.

Motions for Judgment of Acquittal

A denial of a motion for acquittal is reviewed *de novo* "under the standard of 'whether, after reviewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt.'" *United States v. Wuliger*, 981 F.2d 1497, 1509 (6th Cir. 1992), *cert. denied*, 502 U.S. 985, 114 S. Ct. 1293 (1992) (quoting *United States v. Busacca*, 936 F.2d 232, 239 (6th Cir. 1991), *cert. denied*, 502 U.S. 985, 112 S. Ct. 595 (1991)). A jury verdict may be sustained by circumstantial evidence alone. *United States v. Stone*, 748 F.2d 361, 362 (6th Cir. 1984).

A. Motion for Partial Acquittal Regarding Count 11

Count 11 of the indictment alleges that defendant caused a check to be delivered to his office by mail containing a payment from Jardine, a dental insurance company, in the amount of $428.00 for services he performed for his patient Linda Davis. Defendant notes that no testimony was produced at trial from Jardine indicating that the check mentioned in Count 11 was sent by mail, or issued at all. Thus, defendant contends there is no proof that the mails were used with respect to Count 11. Defendant also claims that because no one explained the discrepancy in the amount alleged in Count 11 and the amount appearing on the face of the check in Exhibit 40(c), $422.30, there was no proof that the billing was fraudulent.

The patient who was mentioned in Count 11, Linda Davis, was also mentioned in Counts 8-10. On September 26, 1989, defendant performed an apicoectomy and soft-tissue biopsy on Davis. Davis's patient records indicate that defendant mailed out 7 separate claims relating to her visit, including two to Jardine. Ms. Davis testified that Jardine had

been her husband's insurer at that time. Furthermore, Dr. Austin testified that the multiple billings arising out of the single medical procedure performed on September 26, 1989, were improper multiple billings. Also, defendant's billing clerk at the time, Beth Fofinski, testified that defendant's insurance billings were sent out by mail.

Based on this evidence, we hold that a rational trier of fact could conclude that it was beyond a reasonable doubt that defendant had billed Jardine through the mails, and that such billing was improper.

B. Motion for Acquittal, or in the Alternative, to Strike Allegations from the Indictment

Defendant argues that the trial court erred when it denied his motions for acquittal, or in the alternative, to strike allegations in the indictment. Defendant made a motion for "Total and/or Partial Acquittal" at the close of the Government's case and at the close of all the evidence. (R.38; Tr., 3/6/95, at 88; Tr., 3/14/95, at 95; R.47). However, in none of these instances did defendant request that the trial court strike allegations from the indictment other than Count 11. Defendant consistently requested that a judgment of acquittal be entered as his sole requested relief. Thus, defendant is not entitled to judicial review on this issue.

Defendant argues that if the allegedly deficient allegations were struck from the indictment, it "would have diminished the prejudice of a patchwork verdict based upon multiple theories of fraud not established at trial." (Appellant's Brief at 37.) As stated earlier, there was no danger of a patchwork verdict posed by the Government's theories. Moreover, because defendant does not argue that a rational trier of fact would be unable to convict based upon

the remaining allegations in the indictment, the trial court's denial of defendant's motion for acquittal was not in error.

Expert Testimony

In *United States v. Thomas*, 74 F.3d 676, 681-82 (6th Cir.), *cert. denied*, ___U.S. ___, 116 S. Ct. 1558 (1996),

> "[a]ppellate review of trial court rulings on the admissibility of expert opinion testimony under Fed. R. Evid. 702, depending upon the assignment of error, may involve as many as three separate standards of review." First, we review the trial court's preliminary fact finding under Federal Rule of Evidence 104(a) for clear error. Second, the trial court's determination whether the opinion the expert will offer is properly the subject of "scientific, technical, or other specialized knowledge" is a question of law, which we review de novo. Third, the trial court's determination whether the proffered expert opinion will assist the trier of fact to understand the evidence or to determine a fact in issue is a determination of relevance, which this court reviews for abuse of discretion. In addition, the balancing of probative value against the potential for unfair prejudice under Federal Rule of Evidence 402 is also reviewed only for abuse of discretion.

Id. (citations omitted).
G32

In the instant case, defendant argued that the opinion of Dr. Shirley Austin was inadmissable because Dr. Austin was not qualified as an expert in sampling procedures, and that her testimony therefore lacked foundation and was unhelpful to a jury due to its unreliability. Dr. Austin is a dentist with twenty years experience who serves as Dental Program Administrator for BCBSM. Her responsibilities at BCBSM include final approval authority on dental claims and the creation and review of dental policy. At trial, Dr. Austin testified that she had been requested to audit the patient records seized from defendant's office. Dr. Austin reviewed in detail the fifteen patient charts which formed the basis of the indictment for the benefit of the trier of fact. When asked if these fifteen files were representative of the "types of things" she found in the larger audit sample, Dr. Austin replied in the affirmative. (Tr., 3/14/95, at 57.) However, she never testified as to who performed the sampling, the sampling procedure, or what percentage of the total number of patient charts seized were represented by the sampling.

The trial court judge held that Dr. Austin was clearly qualified as an expert on the billing records and that defendant's objection went to the weight the jury should accord Dr. Austin's testimony rather than to admissibility. The trial court judge acted appropriately in allowing Dr. Austin to testify at trial about the fifteen files introduced by the Government. Defendant does not deny that Dr. Austin is an expert in reviewing billing practices, and these files were all admitted into evidence. Furthermore, it was appropriate for the trial court to allow Dr. Austin to testify that these files were representative of the other files she examined. Because she testified with respect to those files she actually examined, this Court need not address the issue of whether she was an

expert in "sampling" at all. The trial court judge was correct: whether her answers were credible or not was an issue for the trier of fact. *See United States v. August*, 745 F.2d 400, 407 (6th Cir. 1984 (jury may "determine the weight and credibility to be given to this testimony"). Defendant was able to utilize cross examination and closing argument to convince the jury that Dr. Austin's opinions regarding the representativeness of the sample lacked a firm factual foundation. *United States v. L.E. Cooke Co., Inc.*, 991 F.2d 336, 342 (6th Cir. 1993). Thus, we believe that the trial court judge ruled correctly on defendant's objections to Dr. Austin's testimony.

Tax Returns

The trial court's decision to admit evidence over defendant's objections based upon Fed. R. Evid. 403 is reviewed for abuse of discretion. *United States v. Carter*, 969 F.2d 197, 200 (6th Cir. 1992). Defendant objected to the introduction of his professional corporation's tax returns during the years at issue. Defendant contends that because his total professional compensation ranged between $390,000 and $880,000 a year, but the charges focused on less than 5% of his practice, the probative value of evidence regarding defendant's total income is substantially outweighed by its prejudicial effect. The Government argues that the tax returns were highly probative because defendant's insurance billings and payments were made through his professional corporation and the tax returns showed that defendant was president and 100% shareholder of the corporation. Thus, the Government argues, the tax returns were proof of defendant's financial incentive to commit fraud and are

therefore evidence of specific intent to deceive.

We agree with the Government. It is within a trial court's discretion to admit tax returns in a mail fraud prosecution as proof of motive, and motive is evidence of specific intent to deceive. *See United States v. Schnabel*, 939 F.2d 197, 202 (4th Cir. 1991). Furthermore, it is not clear that the tax returns were the least bit prejudicial to defendant's case. A juror may well conclude that someone making a large income but deriving little from allegedly fraudulent practices had little incentive to commit fraud. Thus, the trial court judge properly exercised his discretion in admitting into evidence defendant's tax returns for the years in question.

Sentencing Considerations

The trial court's factual findings for sentencing purposes are reviewed for clear error, with due deference given the trial court's application of the Sentencing Guidelines to the facts of the case. *United States v. Jackson*, 25 F.3d 327, 330 (6th Cir.) (citing *United States v. Peters*, 15 F.3d 540, 546 (6th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 219 (1994)), *cert. denied*, ___ U.S. ___ 115 S. Ct. 344 (1994). A defendant "must carry the heavy burden of persuading this Court that the evaluation of the loss was not only inaccurate, but was outside the realm of permissible computations." *Jackson*, 24 F.3d at 330 (quoting U.S.S.G. § 2F1.1, comment. (n.8) (sentencing court "need only make a reasonable estimate of the range of the loss, given the available information")).

In the instant case, the trial court judge was required to determine the amount of loss pursuant to U.S.S.G. §

2F1.1(b). The amount of loss for sentencing purposes must be established by a preponderance of the evidence. *United States v. Kohlbach*, 38 F.3d 832, 841 (6th Cir. 1994). In sentencing the defendant, the trial judge accepted the figure contained in the revised presentence report, $378,334.33.

> "[A] defendant who challenges factual allegations in the PSR [presentence report] has the burden of producing some evidence beyond a bare denial that calls the reliability or correctness of the alleged facts into question." The burden of convincing the court that the PSR facts are true only shifts back to the prosecutor if the defendant carries his burden of production.

United States v. Rivera, 6 F.3d 431, 444 (7th Cir.) (citations omitted), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1098 (1994); *see United States v. Leal*, 75 F.3d 219, 229 (6th Cir. 1996) ("in order for [defendant] to obtain any reduction in his sentence, he would have to demonstrate that [a number contained in the presentence report was] erroneously ascribed to him by the district court").

Defendant Dolan argues that the proposed loss amount contained in the amended presentence report was not established by a preponderance of the evidence at the sentencing hearing. Defendant contends that the $378,344.33 figures was premised upon two theories: (1) that no endodontic procedure would ever be billed to BCBSM medical/surgical insurance; and (2) that even if billing to this insurance were proper, defendant had not performed any of the endodontic procedures that could be properly billed to medical insurance. Defendant argues that the first premise was disproven by the Government's expert witnesses, Drs.

Austin and Lanier, who testified that certain procedures performed by an endodontist could properly be billed to medical insurance. Defendant maintains that the second premise was disproven by Dr. Austin, who admitted that defendant may have performed procedures properly billed to medical insurance.

The Government contends that the $378,344.33 figure, like the figure in the original presentence report, was a conservative estimate calculated with respect to losses suffered by BCBSM only, and that the $378,344.33 figure represents an accurate compilation of the amounts billed to BCBSM over this period. The Government also notes that Dolan testified at trial that his billing practices with respect to BCBSM were consistent from 1982 onward. (Tr., 3/9/95, at 15.) The Government argues that while Dr. Austin testified that defendant is qualified to perform surgeries properly billed to medical insurance, there was no evidence that any of defendant's billings were proper despite defendant's complete access to his files, all of which were introduced as evidence at trial.

Given that defendant has been unable to produce evidence that even a single one of his billings was legitimate, we decline to hold that the trial court's factual findings were clearly erroneous.

III.

For the reasons stated above, defendant's conviction is ***AFFIRMED***.

APPENDIX B

FILED
DEC 17 1996
LEONARD GREEN, Clerk

No. 95-1769

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
DAVID DOLAN,	)	
Defendant-Appellant.	)	

BEFORE: MILBURN and BOGGS, Circuit Judges; and QUIST,* District Judge.

The court having received a petition for rehearing en

* Hon. Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

DEC 19 1996

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN District of MICHIGAN

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)
v.	
DAVID DOLAN, (Name of Defendant)	Case Number: 94-CR-80761-DT-01
	Frederick B. Bellamy (Retained) Defendant's Attorney

THE DEFENDANT:
☐ pleaded guilty to count(s) _____
☒ was found guilty on count(s) 1 thru 38 of the Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:USC:1341	Mail Fraud	2/18/83	I thru 38

The defendant is sentenced as provided in pages 2 through _____ Of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ____
And is discharged as to such count(s).

☐ Count(s) _____ (Is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $1,900.00, for count(s) 1 thru 38, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United tates attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 373-56-4153
Defendant's Date of Birth: 9/13/52
Defendant's Mailing Address:
1025 Oxbow Lake Shores Drive
White Lake, Michigan 48306
Defendant's Residence Address:

July 5, 1995
Date if Imposition of Sentence

/s/
Signature of Judicial Officer
HONORABLE HORACE W. GILMORE
UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

July 6, 1995
Date

Defendant: David Dolan Judgment-Page ___ of ___
Case Number: 94-80761-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Twenty-four (24) months on Counts one through 38 to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed at an institution near his home and if at all possible the facility in Terre Haute, Indiana.

☐ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district.

☐ at _____ a.m./p.m. on _____

☐ as notified by the United States marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

☐ before 2 p.m. on _____

☒ as notified by the United States marshal.

☒ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____

_____, with a certified copy of this judgment.

United States Marshal

By_____
Deputy Marshal

Defendants: David Dolan Judgment-Page ____ of _____
Case Number: 94-80761-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of two (2) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☒ The defendant shall pay any fines that remain unpaid at the

commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

1. The defendant shall abide by the standard and special conditions of supervised release as adopted by the U.S. District Court for the Eastern District of Michigan.
2. The defendant shall pay restitution and any remaining fine balance at a rate and schedule as directed by the Probation Officer.
3. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the Probation Department unless the defendant is in compliance with the payment schedule.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her defendants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer

for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such

notification requirement.

4. **The defendant shall provide the Probation Officer access to any requested financial information.**

Defendant: David Dolan Judgment-Page ____ of ____
Case Number: 94-80761-01

FINE

The defendant shall pay a fine of $ 86,715.41. The fine includes any costs of incarceration and/or supervision.

☐ This amount is the total of the fines imposed on individual counts, as follows:

This includes cost of incarceration and supervise release which is $36,715.41, plus a fine for Count 1 in the amount of $50,000.00.

☐ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:
☑ in full immediately.
☐ in full not later than _____.
☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

☐in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: David Dolan Judgment-Page ___ of ___
Case Number: 94-80761

RESTITUTION AND FORFEITURE
RESTITUTION

☒ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Blue Cross Blue Shield of Mich.	$2,858.20
Jardine Insurance	428.00
John Hancock Insurance	136.20
Edward Bro. Health Care Plan	674.60
Ameraplan	569.60
Iron Workers Fringe Benefit Funds	1,597.00

Payments of restitution are to be made to:
☐ the United States Attorney for transfer to the payee(s).
☐ the payee(s).

Restitution shall be paid:
☐ in full immediately.
☐ in full not later than _____.
☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this

judgment. Subsequent payments are due monthly thereafter.

☒ in installments according to the following schedule of payments:

As determined by the Probation Department.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

☐ The defendant is ordered to forfeit the following property to the United States:

Defendant: David Dolan Judgment-Page ____ of ____
Case Number: 94-80761-01

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): Restitution

Guideline Range Determined by the Court:

Total Offense Level: 17
Criminal History Category: I
Imprisonment Range: 24 to 30 months
Supervised Release Range: 2 to 3 years
Fine Range: $ 5,000. To $ 50,000

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

☐ Restitution: $ 6,263.60 See Restitution and Forfeiture Sheet

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

APPENDIX D

TITLE 18 U.S.C. § 1341

§ 1341. FRAUDS AND SWINDLES

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

(As amended May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j)(11), 84 Stat. 778; Aug. 9, 1989, Pub.L. 101-73, Title IX, § 961(i), 103 Stat. 500; Nov.

29, 1990, Pub.L. 101-647, Title XXV, § 2504(h), 104 Stat. 4861, Sept. 13, 1994, Pub.L. 103-322, Title XXV, § 250006, Title XXXIII, § 330016(1)(H), 108 Stat. 2087, 2147.)

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. D-1: DAVID W. DOLAN, Defendant.	CRIMINAL NO.: 94-80761 HON. HORACE GILMORE VIO: 18 U.S.C. § 1341 MAGISTRATE JUDGE CARLSON

_____/

INDICTMENT

THE GRAND JURY CHARGES:

COUNTS ONE through THIRTY-EIGHT
(18 U.S.C. § 1341 - MAIL FRAUD)
D-1 DAVID W. DOLAN

I. That between on or about January, 1988, and on or about February, 1993, defendant **DAVID W. DOLAN ("DOLAN")** devised and intended to devise a scheme to defraud Blue Cross Blue Shield of Michigan ("BCBSM"), Ameraplan, Jardines, John Hancock, Edwards Brothers Inc. Employee Health Care Plan, and other insurance companies, and to obtain money from them by means of false and

fraudulent pretenses and representations;

II. That the scheme and false and fraudulent pretenses and representations are described essentially as follows:

DOLAN was a dentist specializing in endodontics whose office was located in Livonia, Michigan. **DOLAN** fraudulently billed BCBSM and other insurance companies, and is patients, in order to obtain money he was not entitled to. That is, **DOLAN:**

-in instances where patients had more than one insurance carrier potentially responsible for payment for services rendered to the patients, billed each insurance company as if it was the primary carrier and either represented that there was no other insurance or fraudulently failed to disclose the existence of other insurance;

-billed each insurance company for the same services;

-billed the insurance companies for alleged "medical" services which were in fact "dental" services;

-billed the insurance companies for alleged "medical" services which had already been billed as "dental" services;

-billed the insurance companies for services which had already been reimbursed as an included component of another billed procedure;

-billed the insurance companies for alleged "hard tissue biopsies" which were in fact "soft tissue biopsies";

-billed the insurance companies for services not in fact rendered;

-failed to return to the insurance companies the excess compensation which he received as a result o his fraudulent billings;

-in some instances, collected fees from his patients which he should not have collected as a "participating" provider pursuant to his agreements with the insurance companies;

-in other instances, failed to collect from his patients co-payments which were required under his and his patients' agreements with the insurance companies;

-falsely stated the date of service on billings to insurance companies in instances where the patient would otherwise have been determined to have exhausted his yearly insurance benefits and not be currently eligible for further benefits.

III. That on or about the dates specified below, in the Eastern District of Michigan, Southern Division, **DOLAN**, for the purpose of executing the scheme to defraud and to obtain money by means of false and fraudulent pretenses and representations, and attempting to do so, did knowingly cause to be sent and delivered by mail to 28803 W. Eight Mile, Suite 103, Livonia, Michigan according to the direction thereon, an envelope that contained an insurance company check paying **DOLAN** for services allegedly rendered to a patient, all in violation of Title 18, United States Code, Section 1341. Each mailing is described more specifically below and constitutes a separate count of this Indictment:

COUNT	DATE	INSURANCE CO./ (ALLEGED SERVICES)	PATIENT	AMOUNT
1	8/17/89	BCBS (medical)	L. Przytulski	$135
2	8/25/89	BCBS (medical)	L. Przytulski	$348
3	9/22/89	BCBS (medical)	L. Przytulski	$213

COUNT	DATE	INSURANCE CO./ (ALLEGED SERVICES)	PATIENT	AMOUNT
4	9/29/89	BCBS (medical)	R. Craig	$168.75
5	10/6/89	BCBS (medical)	R. Craig	$213.00
6	11/3/89	BCBS (medical)	R. Craig	$168.75
7	11/9/89	BCBS (medical)	R. Craig	$213.00
8	10/13/89	BCBS (medical)	L. Davis	$168.75
9	10/20/89	BCBS (medical)	L. Davis	$213.00
10	4/12/90	BCBS (medical)	L. Davis	$208.80
11	5/14/90	Jardine (dental)	L. Davis	$428.00
12	2/8/90	John Hancock (Medical)	S. Varghese	$136.20
13	2/9/90	BCBS (medical)	S. Varghese	$123.00
14	7/6/90	BCBS (medical)	C. Bruner	$312.15
15	11/2/90	BCBS (medical)	P. Wenzel	$160.00
16	11/9/90	BCBS (medical)	P. Wenzel	$213.00
17	12/21/90	BCBS (medical)	S. Nelson	$373.00
18	9/6/91	BCBS (medical)	R. Wolfe	$204.75
19	9/12/91	BCBS (medical)	R. Wolfe	$204.75
20	9/20/91	BCBS (medical)	R. Wolfe	$188.80
21	10/11/91	BCBS (medical)	R. Wolfe	$582.35
22	10/25/91	BCBS (medical)	P. DeCarlo	$431.00
23	10/29/91	Edw. Brothers (Medical)	A. Davis	$61.60
24	11/1/91	BCBS (medical)	A. Davis	$138.00
25	11/8/81	BCBS (medical)	A. Davis	$243.75
26	11/12/91	Edw. Brothers (Medical)	A. Davis	$524.00
27	11/15/91	BCBS (medical)	A. Davis	$236.00
28	11/26/91	Edw. Brothers	A. Davis	$ 89.00
29	11/22/91	BCBS (medical)	J. Thomas	$479.75
30	1/17/92	Ameraplan (Medical)	J. Thomas	$569.60
31	12/5/91	BCBS (medical)	J. Moritz	$195.00
32	12/10/91	Iron Workers (Medical)	J. Moritz	$685.00

COUNT	DATE	INSURANCE CO./ (ALLEGED SERVICES)	PATIENT	AMOUNT
33	12/18/91	Iron Workers (Medical)	J. Moritz	$685.00
34	12/20/91	BCBS (medical)	J. Moritz	$236.00
35	1/10/92	BCBS (medical)	J. Moritz	$236.00
36	6/11/92	BCBS (medical)	W. Burroughs	$464.00
37	8/6/92	BCBS (medical)	J. Armstrong	$371.20
38	2/14/92	BCBS (medical)	R. Marinelli	$236.00

THIS IS A TRUE BILL.

/s/
FOREPERSON

SAUL A GREEN
United States Attorney

/s/
STEPHEN T. ROBINSON (P 28030)
Assistant United States Attorney

/s/
BLONDELL L. MOREY (P 23396)
Assistant United States Attorney
Chief, Economic Crime Unit

Dated: 8/10/94

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	Criminal No.: 94-80761
v.	VIO.: 18 USC § 1341
D-1: DAVID W. DOLAN, Defendant.	HON. HORACE GILMORE MAGISTRATE JUDGE CARLSON

_____/

STEPHEN T. ROBINSON (P28030)
Assistant U.S. Attorney
Federal Building and U.S. Courthouse
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313-237-4752

FREDERICK B. BELLAMY (P10661)
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313-962-5909

DEFENDANT'S REQUEST FOR JURY INSTRUCTIONS

40.17

UNANIMITY -- EXPLAINED

Counts 1 through 38 of the indictment, charging defendant David Dolan with a violation of the mail fraud statute, alleges a number of separate [schemes or plans to defraud] [schemes or plans to obtain money or property by means of false or fraudulent pretenses, representations, or promises.]

The Government is not required to prove [all of the schemes or plans to defraud] [all of the schemes or plans to obtain money or property by means of false or fraudulent pretenses, representations or promises] [all of the false or fraudulent pretenses, representations, or promises] that are alleged in Counts 1 through 38 of the indictment.

Each of the jurors must agree with each of the other jurors, however, that the same [scheme or plan to defraud] [scheme or plan to obtain money or property by means of false or fraudulent pretenses, representations, or promises] alleged in Counts 1 through 38 was, in fact, employed by the Defendant. The jury need not unanimously agree on each scheme or plan, but in order to convict, must unanimously agree upon at least one such scheme or plan as a scheme or plan that was knowingly used by the Defendant.

Unless the Government has proven the same [scheme or plan to defraud] [scheme or plan to obtain money or property by means of false or fraudulent pretenses, representations, or promises] to each of you, beyond a reasonable doubt, you must acquit the Defendant of the mail fraud charge in Counts 1 through 38 of the indictment.

APPENDIX G

FEDERAL JURY PRACTICE AND INSTRUCTIONS

Devitt, Blackmar and O'Malley, fourth Edition, 1990

§ 40.17 **Unanimity -- Explained**

Count ___ of the indictment, charging defendant _____ with a violation of the [mail] [wire] [bank] fraud statute, alleges a number of separate [schemes or plans to defraud] [schemes or plans to obtain money or property by means of false or fraudulent pretenses, representations, or promises].

The government is not required to prove [all of the schemes or plans to defraud] [all of the schemes or plans to obtain money or property by means of false or fraudulent pretenses, representations or promises] [all of the false or fraudulent pretenses, representations, or promises] that are alleged in Count ____ of the indictment.

Each of the jurors must agree with each of the other jurors, however, that the same [scheme or plan to defraud] [scheme or plan to obtain money or property by means of false or fraudulent pretenses, representations, or promises] alleged in Count ___ was, in fact, employed by the defendant. The jury need not unanimously agree on each scheme or plan, but, in order to convict, must unanimously agree upon at least one such scheme or plan as a scheme or plan that was knowingly used by the defendant.

Unless the government has proven the same [scheme or plan to defraud] [scheme or plan to obtain money or property by means of false or fraudulent pretenses,

representations, or promises] to each of you, beyond a reasonable doubt, you must acquit the defendant of the [mail] [wire] [bank] fraud charge in Count ___ of the indictment.

APPENDIX H

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX I

FEDERAL RULES OF CRIMINAL PROCEEDURE

Rule 31. Verdict

(a) **Return.** The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

Rule 7. Indictment and Information

(c) **Nature and Contents.**

(1) **In General.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unkown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.